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in the Supreme Court of the United States

OCTOBER TERM, 1975

CASE NO. 7547

ELAINE M. ORR,

Petitioner,

vs.

FRANK R. MacNEILL & SON, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The District Court's decision is unpublished (App. to Petition 12, 20). The opinion of the Court of Appeals for the Fifth Circuit *reversing* the District Court is reported at 511 F.2d 166 (App. to Petition 21).

QUESTION PRESENTED

Whether the Circuit Court correctly held that Petitioner, Elaine Orr, was not entitled to recover damages for sex discrimination in compensation as an employee under the Equal Pay and Civil Rights Act where the record reveals (1) she did not perform equal work; and (2) the pay scale was based on economic benefits to the employer.

STATUTES INVOLVED

The pertinent provisions of the Civil Rights Act, 42 USC §2000e et. seq. and 2000e-2 et seq. and the Equal Pay Act, 29 USC §206(d)(1) are set forth in Appendix to the Petition at pages 1, 5 and 11 respectively.

STATEMENT

Respondent, Frank R. MacNeill & Son, Inc. is a corporation operating as a general insurance agency representing and underwriting for various insurance companies in the Miami area. (R. 9). It is uncontradicted that for the past eight years, the overall manager (and one of the owners) of the company is Malcolm R. MacNeill, the son of Frank R. MacNeill & Son, Inc. (R. 112; App. to Pet. 37). The only evidence whatsoever of sex discrimination was Mrs. Orr's testimony that Frank R. MacNeill told her that "Mr. Malcolm MacNeill would not pay a woman as much as a man . . ." (R. 29). Frank R. MacNeill, 88 years old, who suffered a stroke in 1965 (R. 112; App. to Pet. 37) and who is no longer active in the management of the company, flatly denied having made the statement. (R. 100). Be that as it may, the trial court elected to believe Mrs. Orr and the

appellate court expressly stated "But, of course, this Court accepts the District Court's determination on credibility." (511 F.2d at 169; App. to Petition 28).

The evidence before the trial court is accurately summarized by the opinion of the Fifth Circuit Court of Appeals:

> "The [Petitioner], Elaine M. Orr, went to work for the agency in 1952, it then had four employees. At the end of 1970, the critical time in this controversy, there were over forty employees. In and after 1967 the organization consisted of four departments, Fire Insurance, Casualty Insurance, Claims and Accounting.
>
> "John F. Bruns, the head of the Fire Insurance Department, was originally employed by MacNeill as a Special Agent or Field Representative. He continued in that capacity after becoming a Vice President and Manager of the Fire Insurance Department. In addition to his General Supervisory activities in the Fire Insurance Department, his duties included handling the underwriting of the Fire Insurance Department and approving or disapproving fire risks. His primary responsibility and activity was the production of business. Bruns contacted agents, collected overdue accounts, and sought to develop new business for the agency. Upon one or more occasions Bruns established commission arrangements with a company represented by the agency. Malcolm MacNeill testified that this 'takes a lot of savvy.'

"The Casualty Insurance Department was in charge of James Moore. He was responsible for underwriting the Casualty Insurance business which was acceptable to the company. This responsibility specifically involved reviewing policies written by agents or instructing someone in the department to underwrite acceptable business. When an agent had a risk which he thought might not be acceptable to the company, the agent and Moore would discuss it, and Moore would decide whether or not to accept the risk. His job, as in the case of Bruns, required decision making and the exercise of discretion.

"The Claims Department was handled through a separate corporation which was a wholly owned subsidiary of Frank R. MacNeill & Son, Inc. It was in charge of Thomas B. Rogan. He was responsible for assigning all claims work which came into the office, for adjusting and settling claims, and for supervising, hiring, firing, and training approximately ten professional adjusters and ten clerical workers. Rogan had unlimited draft authority with several insurance and casualty companies represented by the agency. He issued loss drafts upon determining that claims should be paid. He assisted in the development of new business. His job, like those of Bruns and Moore, required the making of decisions and the exercise of discretion.

"Elaine M. Orr was head of the Accounting Department. She kept the financial and other records, she and others signed checks, she purchased

supplies and supervised the maintenance of the building which housed the agency. She was sometimes consulted by those in other departments but usually with respect to accounting matters.

"The salaries paid to the four department heads for the years 1966 through 1970, as found by the District Court, were as follows:

As of April	FIRE Bruns	CASUALTY Moore	CLAIMS Rogan	ACCOUNTING Orr
1966	10,400.00	8,996.00	9,100.00	10,400.00
1967	11,310.00	10,010.00	10,010.00	11,700.00
1968	15,002.00	10,816.00	14,001.00	12,012.00
1969	15,522.00	12,012.00	15,600.00	13,000.00
1970	18,018.00	14,040.00	18,018.00	14,040.00

"For the years 1969 through 1971 bonuses were paid as follows:

1969	1,000.00	500.00	500.00	500.00
1970	3,500.00	3,500.00	3,500.00	3,500.00
1971	3,500.00	2,500.00	3,500.00	1,500.00"

[511 F.2d at 168-169; App. to Petition 24-26]

The Court continued:

". . . . Bruns testified as to the differences between the production of business and the keeping of records and stressed the job differences. He expressed the opinion that they were of equal importance. Rogan also pointed out that the functions of the Accounting and Claims Departments were not similar, that the duties were different, and not comparable and that there was no parallel. In response to a leading question

Rogan gave an affirmative answer to a query as to whether one function was just as important as another. In her testimony Mrs. Orr recognized the differences between that which she did and that which was done by Bruns and Rogan. She conceded that her accounting activities might be called a mechanical type of thing. She recognized the necessity for the use of judgment and the exercise of discretion in the production and claims departments, and conceded that this was not so in the Accounting Department except in the procurement of supplies." (511 F.2d at 169; App. to Petition 28).

Based on the above evidence the Fifth Circuit Court of Appeals properly reversed the District Court's finding of sex discrimination and correctly relied on the applicable, well established principles of law:

"The sex discrimination provisions of Title VII of the Civil Rights Act of 1964 must be construed in harmony with the Equal Pay Act of 1963, 29 U.S.C.A. Sec. 206(d). Hodgson v. Brookhaven General Hospital, 5th Cir. 1970, 436 F.2d 719; Ammons v. ZIA Co., 10th Cir. 1971, 448 F.2d 117; Shultz v. Wheaton Glass Co., 3rd Cir., 421 F.2d 259, cert. denied, 398 U.S. 905, 90 S.Ct. 1969, 26 L.Ed.2d 64. . . ."

* * *

"To establish a case under Title VII it must be proved that a wage differential was based upon sex and that there was the performance of equal work for equal compensation. Ammons v. ZIA Co., supra.

"The jobs in question need not be identical, but they must be substantially equal. Brennan v. J. M. Fields, Inc., 5th Cir. 1974, 488 F.2d 443; Hodgson v. Corning Glass Works, 2d Cir. 1973, 474 F.2d 226; Hodgson v. Fairmont Supply Co., 4th Cir. 1972, 454 F.2d 490; Ammons v. ZIA Co., supra . . ." (511 F.2d at 170-171; App. to Petition 30-31).

The appellate court further discussed the evidence contained in the record:

"The record does not support the determination that Mrs. Orr sustained her burden of proving equal work. The District Court stated that 'an Insurance Agency operation of this size depends with success upon the efficient functioning of all of its departments.' However true this may be it does not follow that all who participate in the efficient functioning are doing equal work.

"The only evidence of sex discrimination is the controverted statement of Frank R. MacNeill that his son would not pay a woman as much as he paid a man. Yet the fact is that at one time Mrs. Orr was paid more than any of the men who were the other department heads. The fact is that she was paid more than the man who succeeded her and who, presumably, was doing work equal to that which she had done. The fact is that she was never paid less and much of the time was paid more than the salary of Vice President Moore who was the head of the Casualty Department. The facts show that the salary differences were based upon other reasons than the conjecture of

> MacNeill senior that MacNeill junior wouldn't pay a woman as much as a man. Although various phases of a business organization are essential to its operation, it does not follow that the phases involve equal work such as must be shown in an action based upon sex discrimination. Congress certainly did not intend such a result. (511 F.2d at 171; App. to Petition 32).

The Fifth Circuit Court of Appeals accurately concluded:

> "The duties of Mrs. Orr and Messrs. Bruns and Rogan were greatly dissimilar even though each was the manager of a department. This without more precludes the characterization of the performance of their jobs as equal work. Hodgson v. Golden Isles Convalescent Homes, Inc., 5th Cir. 1972, 468 F.2d 1256.
>
> "It is clearly apparent from the undisputed evidence, including the testimony of Mrs. Orr, that Messrs. Bruns and Rogan had greater responsibility and were required to exercise greater skill in the performance of their jobs than was Mrs. Orr. Underwriting fire risks and approving claims require the exercise of judgment and developed skill. The independent judgment of Mrs. Orr in purchasing supplies is not comparable to that involved in underwriting risks and settling claims.
>
> "The evidence failed to show sex discrimination. Judgment should have been entered for the [respondent] . . . ." (511 F.2d at 171; App. to Petition 33).

ARGUMENT

It is at once apparent from Mrs. Orr's petition that, dissatisfied with the ruling of the Fifth Circuit Court of Appeals, she seeks merely a second appellate review of her cause.[1]

The issue in the present case is uniquely narrow, and no tortured presentation of the facts below can convert it into a cause warranting review by this Court on certiorari. The Record below attests that the decision of the Circuit Court of Appeals is manifestly correct. There is no alleged conflict of decisions.[2] nor (considering the intent and history of the Acts involved) could any other result have been sustained. There is no important question of Federal law requiring decision by this Court.[3]

The sole basis for attempting to invoke the jurisdiction of this Supreme Court of the United States is that the appellate court usurped the trial court's function of weighing the evidence. (Petition 8-9). But the opinion herein, on its face, belies that contention: "But, of course, this Court accepts the District Court's determination on credibility." (511 F.2d at 169, App. to Petition, 28).

1. Petitioner Did Not Prove "Equal Work"

Contrary to Petitioner's contention, the appellate court considered only the undisputed evidence and Mrs. Orr's

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[1]E.g. see Justice Taft's remarks in *Magnum County v. Coty*, 262 U.S. 159 at 163.

[2]See *U.S. v. O'Malley*, 383 U.S. 627 (1966) and *Egan v. City of Aurora*, 365 U.S. 514 (1961).

[3]*U.S. v. Muniz*, 374 U.S. 150 (1963).

own testimony and concessions in arriving at the controlling conclusion that Mrs. Orr had failed to sustain her burden of proving "equal work" within the meaning of the applicable Acts. (511 F.2d 170, 171; App. to Petition 29, 38).

All four cases relied on by Petitioner support the decision of the Fifth Circuit. (Petition 14-15). In *Schultz v. Corning Glass Works*, 319 F.Supp. 1161 (W.D.N.Y. 1970) the plaintiff—"inspectors" established the primary element necessary to carry their burden of proof—that the jobs "entail equal work . . . require equal skill, effort and responsibility." The uniquely different managerial positions here involved are not equal nor similar. In *Schultz v. Wheaton Glass Company*, 421 F.2d 259 (3rd Cir. 1971), the female selector-packers established that they performed identical work as the male selector-packers who received 10% more. No such facts are presently before this Court.

In *Wirtz v. Basic Incorporated*, 256 F.Supp. 786 (D. Nev. 1966), female laboratory analysts were entitled to the same wages as male laboratory analysts where the work was substantially equal and required equal skill, effort and responsibility. Here, Mrs. Orr herself recognized the difference between her duties and those of the men involved.

Ammons v. ZIA Company, 448 F.2d 117 (10th Cir. 1971) reiterated the established test that the plaintiff was required to establish "that the work performed by the three higher paid male workers was 'substantially equal' to that performed by her." The Court noted that a naked averment of job discrimination was insufficient to estab-

lish a *prima facie* case. Factual support that the female worker performed "equal work" which requires "equal skill, effort and responsibility" was essential to meet her burden of proof. The Court of Appeals correctly held that Mrs. Orr did not sustain that burden.

2. Respondent Proved That The Difference In Wages Paid To Petitioner And The Other Managers Was Based Upon Economic Benefits.

Mrs. Orr was unable to establish that she performed "equal work" because she admitted that the male managers were required to exercise independent judgment not required of her. It is uncontradicted that these judgments demanded a great deal of knowledge, skill and responsibility. Difference in responsibility and skill alone are sufficient to refute any claim of equal work. See, e.g. *Kilpatrick v. Sweet*, 262 F.Supp. 561 (M.D.Fla. 1967); 29 C.F.R. §800.130(b).

But additionally, respondent also proved the difference in economic benefit to the insurance agency. Messrs. Rogan and Bruns were both actively involved in bringing in new companies and the production of income, while Mrs. Orr admitted that she was in no way involved in the production of earnings. (R. 44, 113, 116).

In *Hodgson v. Robert Hall Clothes, Inc.*, 473 F.2d 589, 594 (3rd Cir. 1973), the court stated:

> "We need go no further than to say the District Court was correct to hold in this case that eco-

nomic benefits to an employer can justify a wage differential."

Economic benefit then, can clearly serve as a basis for a wage differential and in the instant case the evidence uncontradictedly established a profound difference in economic benefit to the Respondent between Petitioner's job and those of the other managers.

CONCLUSION

Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, *et. seq.* and the Equal Pay Act, 29 U.S.C. §206(d) were never intended to supplant the "reasonable business judgments" of the employers of this country. See *Hodgson v. Robert Hall Clothes, Inc.*, 473 F.2d at 597 (3rd Cir. 1973). Nor were they intended to accomplish an absurd result. If Petitioner's contention that equal work means equal importance to the overall efficient operation of the business is carried to its logical end it would mean that female tellers must be paid the same as male loan managers, female waitresses must be paid the same as male chefs, female sergeants the same as male generals, and secretaries the same as attorneys. For each of these people are arguably equally important to the overall operation of each of their respective businesses. The Fifth Circuit correctly refused to permit such a clearly erroneous result.

For the foregoing reasons, it is respectfully submitted that this Petition for Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing Brief of Respondent in Opposition to Petition for Writ of Certiorari was mailed this ____ day of July, 1975 to: ROBERT W. HERVEY, ESQUIRE and RICHARD H. W. MALOY & ASSOCIATES, P.A., Attorney for Petitioner, 370 Minorca Avenue, Coral Gables, Florida 33134.

ALAN G. GREER